Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad b Hj Hassan & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22A–1 OF 2003
ABDUL MALIK ISHAK J
9 APRIL 2004

Civil Procedure — Mareva injunction — Application for — Risks of abuse of dissipating or hiding clandestinely assets — Whether injunction should be granted

Civil Procedure — Mareva injunction — Application for — Worldwide injunction — Properties overseas — Whether worldwide Mareva injunction should be granted

Civil Procedure — Mareva injunction — Variation of — Application to vary to pay legal fees — Right of defendant to legal services — Funds attached did not belong to defendants — Whether variation should be granted

The plaintiffs had earlier taken out an action against the defendants over a purported embezzlement of funds belonging to Lembaga Tabung Haji. Two applications were before the court in this present case. In the first application (encl 4), the plaintiffs applied for a Mareva injunction over the bank accounts and properties of the first, fourth and fifth defendants. In the second application via encl 21, the first defendant applied for an order that an earlier Mareva injunction granted on 21 February 2003 be varied to allow the first defendant to withdraw and/or to spend a sum of money amounting to RM150,000 or a reasonable sum thereof from two named banks for payment of the legal fees. At the outset, the plaintiffs objected to the admissibility of an affidavit affirmed by the fifth defendant on 5 September 2003 (encl 59), said to be served on the plaintiffs' solicitors one day late and in breach of the fifth defendant's solicitor's express and an unequivocal undertaking to the court.

Held, granting the Mareva injunction to the plaintiffs (encl 4) and dismissing the first defendant's variation of the earlier injunction (encl 21):

(1) On the preliminary objection, the fact that the fifth defendant's solicitor had breached his solemn undertaking to the court in his delay to serve the affidavit on the plaintiffs' solicitors, coupled with the prejudices it would bring if admitted would relegate the affidavit of the fifth defendant in encl 59 into oblivion — it must be expunged in its entirety (see para 15).

(2) Evidence before the court showed that the first, fourth and fifth defendants had conspired to defraud the plaintiffs out of the investment sums that were rightly due to them. Thus, to sum up, there was a real risk that the defendants together or on a separate basis have and would dissipate the assets (see para 33).

(3) There was nothing to prevent this court from granting a worldwide Mareva in favour of the plaintiffs since the assets of the defendants especially that of the first defendant were abroad (see para 34); *Babanaft International Co SA v Bassatne & Anor* [1989] 2 WLR 232 followed.

(4) A Mareva injunction in the context of the present case serves as a remedy for the purpose of restraining a judgment debtor or a potential judgment debtor from committing the abuse of dissipating or hiding clandestinely assets that the judgment creditor might lawfully attach for the purpose of satisfying a judgment that is to be given or likely to be given in his favour. That would be the scenario for the plaintiffs as against the defendants especially the first, fourth and fifth defendants. As judgment creditors, the plaintiffs were entitled to the Mareva injunction as against the judgment debtors like the first, fourth and fifth defendants (see para 36).

(5) With regard to the submission that 'nothing leads to the fifth defendant', it was clear that the fifth defendant would have had full knowledge of all transactions concerning the abuse of the investment funds. As a shareholder, a director and signatory to the fourth defendant — Asasi, it was improbable, if not impossible, for the fifth defendant to submit that she had no knowledge of any of the transactions concerning the abuse of the investment funds. So if not restrained by a Mareva injunction there was a real risk that the fifth defendant may proceed to dissipate further sums to the absolute and complete detriment of the plaintiffs (see para 38); *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 and *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1956] 3 All ER 624 followed.

(6) It was clear as crystal that as phrased and framed, prayer (a) to encl 21 did not reflect the true intention of the first defendant. It was badly drafted and it did not convey what the affidavit in encl 54 had said. As presently worded encl 21 must be dismissed forthwith with costs. However, the court proceed into the merit of the application (see para 49).

(7) The first defendant had admitted that the funds in the bank accounts did not belong to him. The first defendant too further admitted that he had misused and abused the funds belonging to the plaintiffs' clients. That being the case, the court cannot accede to encl 21. Those assets were not owned by the first defendant and he had no right to use those funds as indicated in his application It was incumbent on the part of the court to have regard to the interests of the plaintiffs and consider whether the variation of the injunction would involve a real risk that a judgment or award in the plaintiffs' favour would remain unsatisfied. In the circumstances, if encl 21 was allowed it would deteriorate the entire assets of the first defendant and it would undoubtedly cause severe injustice and prejudice to the plaintiffs (see paras 56 and 60); *Bank*

Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman [1990] 3 MLJ 481; *Iraqi Ministry of Defence v Arcepey Shipping Co SA & Anor* [1981] QB 65; [1980] 1 All ER 480; *S&F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62; *Ace King Pte Ltd v Circus Americano Ltd & Ors* [1985] 2 MLJ 75 and *Poly Electronic & Electrical (M) Sdn Bhd v Daewoo Corp* (No 1) [2003] 2 MLJ 310 distinguished.

[Bahasa Malaysia summary

Plaintif pada awalnya telah mengambil satu tindakan terhadap defendan atas satu penggelapan dana yang disengajakan yang dimiliki oleh Lembaga Tabung Haji. Dua permohonan telah dibuat di hadapan mahkamah di dalam kes ini. Di dalam permohonan pertama (Lampiran 4), plaintif telah memohon injunksi Mareva *ke* atas akaun-akaun bank dan harta-harta defendan pertama, keempat dan kelima. Di dalam permohonan kedua melalui lampiran 21, defendan pertama telah memohon satu arahan bahawa injunksi Mareva yang diberikan pada awalnya pada 21 Februari 2003 diubah untuk membolehkan defendan pertama mengeluarkan dan/atau membelanjakan sejumlah wang sebanyak RM15,000 atau satu jumlah yang munasabah daripada dua bank yang dinamakan untuk pembayaran yuran guaman. Pada mulanya, plaintif telah membantah penerimaan masuk satu afidavit yang diikrarkan oleh defendan kelima pada 5 September 2003 (lampiran 59), yang dikatakan telah diserahkan sehari lewat kepada peguam plaintif dan melanggar akujanji peguam defendan yang nyata dan jelas kepada mahkamah.

Diputuskan, memberikan injunksi Mareva kepada plaintif (lampiran 4) dan menolak perubahan defendan pertama kepada injunksi awal (lampiran 21):

(1) Pada bantahan awal, fakta di mana defendan kelima telah melanggar akujanjinya yang bersungguh-sungguh kepada mahkamah berkenaan kelewatannya untuk menyerahkan afidavit kepada peguam plaintif, ditambah dengan prejudis-prejudis yang dibawa sekiranya dibenarkan akan mengetepikan afidavit defendan kelima — ia hendaklah dipadamkan secara keseluruhannya (lihat perenggan 15).

(2) Keterangan di hadapan mahkamah menunjukkan bahawa defendan pertama, keempat dan kelima telah berpakat untuk menipu plaintif mengenai jumlah pelaburan yang sepatutnya dibayar kepada mereka. Oleh itu, sebagai kesimpulannya, terdapat risiko yang sebenar bahawa defendan bersama-sama atau atas satu dasar yang berlainan akan melesapkan aset-aset itu (lihat perenggan 33).

(3) Tiada apa yang boleh menghalang mahkamah ini daripada memberi satu Mareva serata dunia kepada plaintif kerana aset-aset defendan khususnya defendan pertama berada di luar negara (lihat perenggan 34); *Babanaft International Co SA v Bassatne & Anor* [1989] 2 WLR 232 diikut.

(4) Injunksi Mareva di dalam konteks kes ini bertindak sebagai remedi untuk menghalang penghutang penghakiman atau penghutang penghakiman yang berpotensi daripada melakukan penyalahgunaan untuk melesapkan dan menyorokkan secara sulit aset-aset yang pemiutang penghakiman sepatutnya berhak sebagai tujuan memenuhi penghakiman yang akan diberikan atau yang mungkin diberikan kepadanya. Ini adalah merupakan senario kepada plaintif terhadap defendan khususnya defendan pertama, keempat dan kelima. Sebagai pemiutang penghakiman, plaintif berhak kepada injunksi Mareva terhadap penghutang penghakiman seperti defendan pertama, keempat dan kelima (lihat perenggan 36).

(5) Berkenaan dengan hujah *'nothing leads to the fifth defendant'*, ia adalah jelas bahawa defendan kelima mempunyai pengetahuan sepenuhnya transaksi-transaksi berkenaan dengan penyalahgunaan dana-dana pelaburan. Sebagai seorang pemegang saham, pengarah dan penandatangan kepada defendan keempat — adalah tidak munasabah, sekiranya bukan mustahil, untuk defendan kelima berhujah bahawa beliau tidak mengetahui sebarang transaksi mengenai penyalahgunaan dana-dana pelaburan. Maka jika tidak dihalang oleh satu injunksi Mareva terdapat risiko yang sebenar bahawa defendan kelima akan melupuskan jumlah yang berikutnya yang boleh menjejaskan plaintif secara mutlak dan keseluruhannya (lihat perenggan 38); *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 and *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1956] 3 All ER 624 diikut.

(6) Adalah jelas seperti kristal seperti yang diungkapkan dan digambarkan, permohonan (a) kepada lampiran 21 tidak menggambarkan niat sebenar defendan pertama. Ia didrafkan secara teruk dan tidak menyatakan apa yang dikatakan oleh afidavit di lampiran 54. Seperti yang diungkapkan sekarang lampiran 21 sepatutnya ditolak dengan kos. Walau bagaimanapun, mahkamah meneruskan kepada merit permohonan itu (lihat perenggan 49).

(7) Defendan pertama telah mengaku bahawa dana-dana di dalam akaun bank tidak dimiliki oleh beliau. Defendan pertama juga seterusnya mengaku bahawa dia telah menyalahgunakan dana-dana yang dimiliki oleh klien-klien plaintif. Dalam keadaan sedemikian, mahkamah tidak menyetujui lampiran 21. Aset-aset tersebut tidak dimiliki oleh defendan pertama dan beliau tidak mempunyai hak untuk menggunakan dana-dana tersebut seperti yang ditunjukkan di dalam permohonannya. Amatlah penting mahkamah mengambil kira kepentingan plaintif dan menimbangkan sama ada perubahan injunksi akan melibatkan risiko yang sebenar bahawa satu penghakiman atau award kepada plaintif akan kekal tidak dipenuhi. Di dalam keadaan ini, sekiranya lampiran 21 dibenarkan ia akan meruntun seluruh aset-aset defendan pertama dan tanpa ragu-ragu akan menyebabkan ketidakadilan yang serius dan prejudis kepada plaintif (lihat perenggan 56 dan 60); *Bank Bumiputra Malaysia Bhd & Anor v Lorrain*

Esme Osman [1990] 3 MLJ 481, *Iraqi Ministry of Defence v Arcepey Shipping Co SA & Anor* [1981] QB 65; [1980] 1 All ER 480; *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62; *Ace King Pte Ltd v Circus Americano Ltd & Ors* [1985] 2 MLJ 75 and *Poly Electronic & Electrical (M) Sdn Bhd v Daewoo Corp* (No 1) [2003] 2 MLJ 310 dibeza.]

Notes

For cases on Mareva injunction, see 2(1) *Mallal's Digest*(4th Ed, 2004 Reissue) paras 3083-3157

For cases on application for injunction, see 2(3) Mallal's Digest (4 th Ed, 2001 Reissue) paras 2464–2471

For Mareva injunction, see 1 *Halsbury's Laws of Malaysia* paras [10.5-035] – [10.5-039]

Cases referred to

A v C (Note) [1981] QB 956 (refd)
A v C (No 2) [1981] QB 961, [1981] 2 All ER 126 (refd)
A J Bekhor & Co Ltd v Bilton [1981] 2 All ER 565, [1981] 2 WLR 601 (refd)
Ace King Pte Ltd v Circus American Ltd & Ors [1985] 2 MLJ 75 (dist)
Allen v Jambo Holdings Ltd [1980] 2 All ER 502, [1980] 1 WLR 1252 (refd)
Ang Chee Huat v Engelbach Thomas Joseph [1985] 2 MLJ 83 (refd)
Appleton v BKS (1804) East 148 (refd)
Aslatt v Southampton Corpn (1880) 16 Ch D 143 (refd)
Atlas Maritime Co SA v Avalon Maritime Ltd (No 3) ('The 'Coral Rose') [1991] 1 Lloyd's Law Reports 563 CA (refd)
Atlas Maritime Co SA v Avalon Maritime Ltd (The 'Coral Rose') [1990] 2 Lloyd's Rep 258; affirmed vide [1991] 4 All ER 769, [1991] 1 Lloyd's Law Reports 563 CA (refd)
Babanaft International Co SA v Bassante And Another [1989] 2 WLR 232 (folld)
Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman [1990] 3 MLJ 481 (refd)
Barclay-Johnson v Yuill [1980] 3 All ER 190, [1980] 1 WLR 1259 (refd)
Beddow v Beddow (1878) Ch D 89 (refd)
Bolton (Engineering) Co Ltd v TJ Graham & Sons, Ltd [1956] 3 All ER 624 (folld)
Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor [1998] 4 CLJ 754 (refd)
Brandon v Smith (1853) 1 WR 130 (refd)
Burrell v Jones (1819) 3 B & Ald 47 (refd)
Chartered Bank v Daklouche [1980] 1 All ER 205, [1980] 1 FLR 107 (refd)
Cheltenham & Gloucester plc v Krausz & Anor, The Venus Destiny [1980] 1 All ER 718, [1980] 1 WLR 460 (refd)
DVA & Co (1900) 1 Ch 484 (refd)
Day v Brownrigg (1878) 10 Ch D 294 (refd)
Derby & Co Ltd v Weldon, (Nos 3 & 4) [1990] Ch 65 (refd)
Fellowes & Son v Fisher [1976] 1 QB 122 (refd)
Hall v Ashurst (1833) 1 Cr & M 714 (refd)

HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1956] 3 All ER 624 (folld)
Harris v Beauchamp Bros (1894) 1 QB 801 (refd)
Iraqi Ministry of Defence v Arcepey Shipping Co SA & Anor [1981] QB 65, [1980] 1 All ER 480 (dist)
Iverson v Conington (1823) 1B & C 160
Jones v Evening Standard Co Ltd (1932) 2 KB 340
Johnson v Ogilby (1734) 3 P Wms 277
Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors [1997] 5 CLJ 307
Leedham v Baxter (1856) 4 WR 241
Lembaga Tabung Haji v Metrowangsa Asset Management Sdn Bhd & Anor [2002] MLJU 444; [2002] 4 CLJ 561, [2003] 1 AMR 303 (refd)
Leonard's Carrying Co Ltd v Asiatic Petroleum Co Ltd (1915) AC 705 (folld)
Mercedes-Benz AG v Leiduck [1985] 3 All ER 929 (refd)
Montecchi v Shimco (UK) Ltd [1979] 1 WLR 1180 (refd)
Morgan v Hart (1914) 2 KB 183 (refd)
Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH und Co KG (The Niedersachsen) [1984] 1 All ER 398; (1983) 2 Lloyd's Rep 600 (refd)
Nippon Yusen Kaisha v Karageorgis [1975] 3 All ER 282, [1975] 1 WLR 1093 (refd)
Pacific Centre Sdn Bhd v United Engineers Bhd [1984] 2 MLJ 143 (folld)
Poly Electronic & Electrical (M) Sdn Bhd v Daewoo Corp (No 1) [2003] 2 MLJ 310 (dist)
Pott v Stuteley (1935) WN 140 (refd)
Prince Abdul Rahman B Turki Al Sudairy v Abu-Taha [1980] 3 All ER 409, [1980] 1 WLR 1268 (refd)
R Pass (1887) 35 WR 410 (refd)
Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) (1978) QB 644, [1977] 3 All ER 324 (refd)
Re Bentley, ex parte Bentley (1833) 2 Deac & Ch 578 (refd)
Re C (1908) 53 Sol Jo 119 (refd)
Re Fairthorne (1846) 1 Saund & C 40 (refd)
Re FC (1888) WN 77 (refd)
Re Gee 18452 Dow & L 997 (refd)
S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62 (dist)
Silver and Drake v Baines [1971] 1 QB 396, [1971] 1 All ER 473 (refd)
The Rena K (1979) QB 377, [1979] 1 All ER 397 (refd)
Third Chandris Shipping Corp v Unimarine SA [1979] QB 645, [1979] 2 All ER 972 (refd)
United Mining and Finance Corp Ltd v Becher (1910) 2 KB 296 (refd)
Watson v Murrel 18241 C & P 307 (refd)
Z Ltd v A [1982] 1 All ER 556, [1982] 2 WLR 288 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Fatal Accidents Act 1976 [UK]
Rules of the High Court 1980 O 11 r 9, O 29 r 1

M Reza Hassan (Abdullah Abdul Rahman with him) (Cheang & Ariff) for the plaintiffs.
Mohd Hanif Idris (Fozi Zain & Partners) for the first, fourth and fifth defendants

Syed Shafiq Alhabshee (Zul Rafique & Partners) holding a watching brief for Lembaga Tabung Haji.

Abdul Malik Ishak J:

INTRODUCTION

[1] The fiasco of the purported embezzlement of funds belonging to Lembaga Tabung Haji resulted in the present suit. The plaintiffs' herein went after the defendants herein in an attempt to purge their flagging reputation.

[2] There were two enclosures for disposal and both of them were quite interesting. Encls 4 and 21 were the two enclosures in question. Quantum wise the plaintiffs' claims came up to RM124,907,691.03. Now, encl 4 was the plaintiffs' application for a Mareva injunction against the first, fourth and fifth defendants. While encl 21 was the first defendant's application for an order that the Mareva injunction granted by my immediate predecessor on 21 February 2003 as seen in encl 9 be varied on certain terms.

[3] The parties agreed that I should hear encl 4 first before hearing encl 21. So, I proceeded to hear these two enclosures in that order.

[4] The first defendant by the name of Ahmad Hj Hassan is the husband of the fifth defendant by the name of Samsiah bte Hamdan. Now, Samsiah bte Hamdan wears many hats. She was also described as a director and shareholder of the fourth defendant by the name of Asasi Trade & Marketing Sdn Bhd (Co No 226557). She too was also described as a signatory together with her husband to all cheques belonging to the fourth defendant.

[5] It must be borne in mind that the Mareva injunction was discharged against the second defendant by the name of Mohd Firdaus Ramlee and this was on 10 March 2003. In regard to the third defendant by the name of Multitude Global Asset Management Private Limited–BVI (IBC No 329542), a judgment in default was entered against it on 11 July 2003 as can be seen in encl 47.

[6] Ahmad Hj Hassan, the first defendant herein, is no stranger to the courts. He was cited as a party and appeared in court *vide* civil suit no S5–21–22 of 2002 and incidentally I was then the presiding judge. He figured prominently in civil suit no S5–21–22 of 2002 because he was cited for contempt and Lembaga Tabung Haji applied to commit him to prison for contempt of court for failing to comply with an earlier order of the court dated 13 March 2002 directing him to, *inter alia*, swear an affidavit disclosing to Lembaga Tabung Haji the total value of his assets with full particulars. In resisting the application to commit him to prison, he contended that the confiscation of all the material documents from his residence and office by the investigators from the central bank had frustrated all his sources of reference and thus

made it impossible for him to comply with the said order of the court. Even though he was found to be in contempt of the said order of the court, yet the apology advanced by him when he took the stand in the witness box before me then was duly accepted by me. The judgment for that civil suit no S5-21-22 of 2002 has since been reported in two popular local law journals vide *Lembaga Tabung Haji v Metrowangsa Asset Management Sdn Bhd & Anor* [2002] 4 CLJ 561; [2003] 1 AMR 303.

[7] Lembaga Tabung Haji, though not a party in the present proceedings, was certainly interested to know of the outcome of encls 4 and 21 because they engaged a counsel in the person of Mr Syed Shafiq Alhabshee to hold a watching brief.

ENCLOSURE 4

[8] Pursuant to O 29 r 1 of the Rules of the High Court 1980 ('RHC') read together with O 11 r 9 of the RHC as well as the inherent jurisdiction of the court, the plaintiffs sought for the following orders as seen in encl 4:

1 Upon the undertaking of the Plaintiffs:

(a) To obey any order this Honourable Court or the Judge may make as to damages in case this Honourable Court or a Judge should hereafter be of the opinion that the defendants shall have sustained any by reason of this Order which the plaintiffs ought to pay.

(b) To pay reasonable costs incurred by any persons other than the defendants to whom notice of this Order may be served to ascertain whether any assets to which this order applies are within their power, possession or control and in compliance with this Order and to indemnify any parties against all liabilities which may result from such compliance.

(c) To notify the defendants as soon as practicable with regards to the granting of the injunction and the terms of the said injunction and to serve on the defendants as soon as practicable this Order as well as the Summons in Chambers for the return date together with a copy of the affidavit and exhibits which contain evidence relied on by the plaintiffs and to inform the defendants of their right to apply to this Honourable Court to vary or discharge this Order or for directions.

(d) To give a copy of this Order to any parties notified of this Order by the solicitors of the plaintiffs and to inform all third parties that has been notified and affected as a result of this Order of their right to apply to this Honourable Court to vary or discharge this Order or for directions.

(e) Not to begin proceedings without the leave of this Honourable Court against the defendants in any other jurisdiction or to use the information obtained as a result of an Order by the Honourable Court in this jurisdiction for purposes of civil or criminal proceedings in any other jurisdiction.

(f) Not without the leave of this Honourable Court to enforce this Order in any country outside Malaysia or to obtain a similar order including orders conferring a charge or other security against the defendants or the defendants' assets.

2 That the defendants whether acting on their own, through their servant or agent or any of them, or otherwise in any way restrained by an injunction, and an injunction be granted, until the final disposal of this suit or until further Order of this Honourable Court from selling, parting with, encumbered by way of security or otherwise, transfer, dispose, diminish the value of and/or otherwise dealing with their assets especially:

(a) property and assets of the first defendant, in particular but not limited to the following:

(i) Bank Account

Account No	Name of Bank/ Institution	Place	Account Type	Current Balance
3064877303	Public Bank Berhad	Malaysia	Current	RM13,588.91
1253-0003203 -05-0	Bumiputra Commerce Bank Bhd	Malaysia	Current	RM143,490.41
1253-0005348 -05-0	Bumiputra Commerce Bank Bhd	Malaysia	Current	RM4,333.47
512204114669	Malayan Banking Bhd	Malaysia	Current	RM946.22
2141380004669	RHB Bank Bhd	Malaysia	Current	RM3,630.60
04386693	Lembaga Tabung Haji	Malaysia	Not available	RM3,184.62
4-12204-7-230 -0	Maybank Taman Melawati	Malaysia	Current	Not available
512214114669	Maybank	Malaysia	Not available	Not available
5160004194	BBMB Bank	Malaysia	Not available	Not available
0000046146	RHB Bank	Malaysia	Not available	Not available
5710264940	Bank Muamalat	Malaysia	Not available	Not available
3064877303	Public Bank	Malaysia	Not available	Not available
1019087803	United Overseas Bank	Singapore	Current	USD5,584.86

Account No	Name of Bank/ Institution	Place	Account Type	Current Balance
1013087550	United Overseas Bank	Singapore	Current	SGD3,193.29
10111114468	United Overseas Bank	Singapore	Margin Trading	Not available
1010710877 (Lien)	United Overseas Bank	Singapore	Deposit	Not available
1985597-15-1	AMEX Bank Collyer Quay	Singapore	Multi Currency A/C	Not available
816300A 816203 920310 920311 920312 920331 920331A	Man Financial (S) Ltd	Singapore	Trading	Not available
816300	Man Financial (S) Pte Ltd	Singapore	FX Trading (Joint Account with 5th Defendant)	Not available
0108407470 (SGD) 0174041322 (USD)	Standard Chartered Bank	Singapore	Current	Not available
63300	American Express Bank	Singapore	CFX Trading & Deposit	Not available
50703	OCBC Bullion & Futures	Singapore	Current	Not available
6002391301 6002391302 (USD) 6002391303 (SGD)	ABN Amro Bank	Singapore	Time Deposit Current	Not available
483-854601-02-8	ABN Amro Securities	USA New York	Current	Not available
1010066797982	First Union National Bank	USA North Carolina	Not available	Not available

Account No	Name of Bank/ Institution	Place	Account Type	Current Balance
2989218	Haris Trust and Savings Bank	USA Chicago, Illinois	Not available	Not available

(ii) Real Properties

Address/Location	Type
1, Jalan Bukit Setiawangsa 8, Taman Setiawangsa, 50200 Kuala Lumpur	House
19, Jalan Seri Emas 19, Taman Seri Emas, 75460 Melaka	House
2-1G, Jalan AU1A/4F, Taman Keramat Permai, 54200 Kuala Lumpur	Office Lot
Mukim Batu 12, Gombak, Kuala Lumpur	Orchard Land
Mukim Penarak, Langkawi, Kedah	Land
Mukim Bandar Ulu Kelang, Selangor	Land
Mukim Seberang Prai Utara, Pulau Pinang	Land

(iii) Vehicles

Registration No	Type
WGL 8259	Perodua Kancil

(iv) Shares

Account No	Type	Name of Bank/Institution	Current Balance
Not in record	Flexinvest	Bumiputra Commerce Bank Bhd	RM5,000

whether within the jurisdiction of this court or otherwise and whether in the name of the first defendant personally or not and whether owned solely or jointly in so far as the same does not exceed the amount of RM124,907,691.03.

(b) Property and assets of the second defendant, in particular but not limited to the following:

(i) Bank Account

Account No	Name of Bank/ Institution	Place	Type of Account	Current Balance
Not available	Standard Chartered Bank Ltd	Singapore	Not available	Not available

whether in the jurisdiction of this Court or otherwise and whether in the name of the second defendant personally or not and whether owned solely or jointly in so far as the same does not exceed the amount of RM124,907,691.03.

(c) property and assets of the third defendant, in particular but not limited to the following:

(i) Bank Accounts

Account No	Name of Bank/ Institution	Place	Account Type	Current Balance
1019089083 1013075404	UOB Bank Raffles Place	Singapore	USD Current SGD Current	Not available
1013075404	UOB Bank	Singapore	SGD Current	Not available
10111114468	UOB Bank Ltd	Singapore	Margin Trading	Not available
1010710877 (Lien)	UOB Bank Ltd	Singapore	Deposit	Not available
17/0141317	Singapore Stock Exchange	Singapore	Trading	Not available
63300	American Express Bank Ltd	Singapore	CFX Trading & Deposit	Not available
Not available	Standard Chartered Bank	Singapore	Deposit/Lien	Not available
483-854601-02-8	ABN Amro Securities LLC	New York, USA	Current	Not available

whether in the jurisdiction of this Court or otherwise and whether in the name of the third defendant personally or not and whether owned solely or jointly in so far as the same does not exceed the amount of RM124,907,691.03.

(d) property and assets of the fourth defendant, in particular but not limited to the following:

(i) Bank Account

Account No	Name of Bank/ Institution	Place	Account Type	Current Balance
125300061620 55 (New) 0980616200 (old)	Bumiputra-Commerce Bank	Malaysia	Current	Not available

whether in the jurisdiction of this court or otherwise and whether in the name of the fourth defendant personally or not and whether owned solely or jointly in so far as the same does not exceed the amount of RM124,907,691.03.

(e) property and assets of the fifth defendant, in particular but not limited to the following:

(i) Bank Accounts

Account No	Name of Bank/ Institution	Place	Account Type	Current Balance
816300	Man Financial (S) Pte Ltd	Singapore	FX Trading (Joint Account with 1st Defendant)	Not available
1253-0008473527	Bumiputra Commerce Berhad	Malaysia	Not available	Not available
1430-0003736526	Bumiputra Commerce Berhad	Malaysia	Not available	Not available

whether in the jurisdiction of this court or otherwise and whether in the name of the fifth defendant personally or not and whether owned solely or jointly in so far as the same does not exceed the amount of RM124,907,691.03.

3 That the defendants and each of them whether acting by themselves, their servants or agents or any of them, or otherwise by any way whatsoever in 7 days from the service of this order disclose to the plaintiffs by way of a sworn affidavit the full value of their personal assets and/or assets held jointly that shows the full particulars of the type and details of all assets and location of the said assets whether within the jurisdiction or otherwise and whether held by them in their personal names or by nominees or otherwise on their behalf and whether owned solely or jointly.

4 That plaintiffs be granted leave to serve this Order outside the jurisdiction onto the following:

(i) United Overseas Bank Ltd
5th Storey, UOB Plaza 1
80 Raffles Place, 048624 Singapore
A/C No 1019087803
A/C No 1013087550
Margin Trading A/C No 10111114468
Deposit A/C No 1010710877 (Lien)

(ii) American Express Bank Ltd
Collyer Quay, Singapore 905083
A/C No 1985597-15-1
CFX Trading & Deposit No 63300

(iii) Man Financial (S) Pte Ltd
3, Philip Street
#09-02 Commerce Point
Singapore 048693
Trading A/C Nos
816300A
816300
816203
920310
920311
920312
920331
920331A

(iv) Standard Chartered Bank Ltd
No 6 Battery Road
Singapore 049906
A/C No 0108407470 (SGD)
A/C No 0174041322 (USD)
An account in the name of the second defendant

(v) OCBC Bullion & Futures Pte Ltd
No 18 Church Street
#07-00, OCBC Centre South
Singapore 049479
A/C No 50703

(vi) ABN Amro Bank,
50 Raffles Place, #01-03 Singapore Land Tower
Singapore 048623
Time Deposit No 6002391301
A/C No 6002391302 (USD)
A/C No 6002391303 (SGD)

(vii) ABN Amro Securities
55 East 52nd Street
New York NY 10055, USA
A/C No 483-854601-02-8

(viii) First Union National Bank, North Carolina, USA
A/C No 1010066797982

(ix) Haris Trust and Savings Bank, Chicago, Illinois, USA
A/C No 2989218

5 Costs.

6 A return date be fixed for the inter-partes hearing of the application herein prior to the expiry of the 21st day after the disposal of the *ex-parte* hearing of this application.

7 Such further or other relief that this Honourable Court deems fit and reasonable.

[9] The grounds in support can be seen in the affidavit affirmed by Ghazali b Atan on 18 February 2003 as seen in encl 3 and briefly this was what the deponent said (see encl 4 at p 13 to 14 thereof):

a) The plaintiffs are in the process of commencing a legal suit against the defendants for claim of RM124,907,691.03 (`the Amount Claimed').

b) The plaintiffs are fund management companies. As agreed pursuant to four written agreements the plaintiffs placed their clients' investments with the fourth defendant.

The fourth defendant is required to forward the investment monies to the first and/or third defendant to be traded at the foreign exchange market in Singapore.

c) The defendants jointly and/or severally failed to invest a substantial sum of the investment sums as agreed under the terms of the four investment agreements executed between the second plaintiff and the third defendant.

d) The first defendant has, jointly and/or severally with the other defendants, by way of fraud and deceit, abused the investment money for purposes other than what have been agreed under the four investment agreements in breach of the four investment agreements and in breach of trust.

e) Although the plaintiffs have demanded that the third defendant return the investment money amounting to RM124,907,691.03, the third defendant has failed, neglected and/or refused to do so.

f) The plaintiffs state that due to the actions of the defendants to date as stated in the affidavit of Ghazali b Atan filed herein, there is a real risk that the defendants may dissipate their assets when they learn of this suit. This will result in the frustration of any judgment that the plaintiffs may obtain against the defendants.

g) Due to the reasons stated therein, the Plaintiffs contend that an injunction and ancillary applications in the form stated above is necessary.

[10] Now, should the Mareva injunction be granted as sought for by the plaintiffs? That would be the RM124,907,691.03 question to pose. I would, for the reasons as alluded to hereinafter, answer that question in the positive.

PRELIMINARY OBJECTION

[11] At the outset, the plaintiffs objected to the admissibility of an affidavit affirmed by the fifth defendant on 5 September 2003 as reflected in encl 59 and styled as the *'Affidavit Jawapan III Defendan Kelima'*. That third affidavit in encl 59 was filed on 5 September 2003 and the grounds for the objection have been lucidly set out by counsel for the plaintiffs in the following terms:

(1) that on 21 August 2003 during the hearing of encl 4 on an *inter partes* basis, the fifth defendant's solicitor by the name of Hj Mohamad Fozi b Md Zain, had given an express and an unequivocal undertaking to the court that he would file and serve the fifth defendant's affidavit in reply to encl 58 on 4 September 2003;

(2) that in breach of his solemn undertaking, the third affidavit of the fifth defendant in encl 59 was served on the plaintiffs' solicitors on 5 September 2003;

(3) that the service of the third affidavit of the fifth defendant was preceded by an oral request from the learned counsel for the fifth defendant in the person of Mr Mohd Hanif Idris to the plaintiffs' solicitors for an extension of time to file and serve the same after 4 September 2003;

(4) that this oral request was made by way of a telephone call on 4 September 2003 at approximately 3.45pm;

(5) that the plaintiffs' solicitors were constrained from acceding to the oral request since the undertaking by Hj Mohamad Fozi b Md Zain was given to the court and towards this end reference to the plaintiffs' solicitors' letter to the fifth defendant's solicitors dated 4 September 2003 should be made and that letter has been exhibited as exh III to the plaintiffs' further affidavit affirmed by Ghazali b Atan on 18 September 2003 as seen in enclosure 61;

(6) that the breach of the undertaking given to the court was said to be the latest episode in a series of non-compliance of court directives and of the delaying tactics employed by the fifth defendant; and

(7) the delaying tactics adopted by the fifth defendant were said to be as follows:

(a) that the fifth defendant had initially instructed Messrs BC Teh & Yeoh to accept service of process on her behalf (see the letter of 26 February 2003 from Messrs BC Teh & Yeoh to the plaintiffs' solicitors marked as exh IV annexed to the plaintiffs' further affidavit affirmed by Ghazali b Atan on 18 September 2003 as seen in encl 61);

(b) that on 8 March 2003 at 9.07pm, a fax was received by the plaintiffs' solicitors from the fifth defendant's solicitors relaying the message that the fifth defendant had engaged Messrs Zamani Ibrahim Tarmizan & Co as her new solicitors (that fax has been annexed as exh V to the plaintiffs' further affidavit affirmed by Ghazali b Atan on 18 September 2003 as seen in encl 61);

(c) that on 10 March 2003 during the *inter partes* hearing of encl 4 Messrs Zamani Ibrahim, Tarmizan & Co sought an adjournment of the *inter partes* hearing on the basis that they had a last minute appointment; and

(d) that taken in its correct perspective and based on the totality of the delaying tactics adopted by the fifth defendant it was submitted that the plaintiffs had been prejudiced.

[12] Now, an undertaking to the court in the course of proceedings should not be treated lightly. Such an undertaking is often equated on the same footing as an injunction and so it may be enforced by committal (*DVA & Co* (1900) 1 Ch 484). Such an undertaking too may be enforced summarily (*Re FC* (1888) WN 77; *United Mining and Finance Corpn Ltd v Becher* (1910) 2 KB 296; *Jones v Evening Standard Co Ltd* (1932) 2 KB 340 at 342; and *Pott v Stuteley* (1935) WN 140) upon an application to the court. But before the committal may be pursued further it must be shown conclusively that the undertaking is given by the counsel personally (*Burrell v Jones* (1819) 3 B & Ald 47; *Iverson v Conington* (1823) 1B & C 160; *Watson v Murrel* 18241 C & P 307; *Re Bentley, ex parte Bentley* (1833) 2 Deac & Ch 578; *Hall v Ashurst* (1833) 1 Cr & M 714; *Brandon v Smith* (1853) 1 WR 130; and *Leedham v Baxter* (1856) 4 WR 241). It must be emphasised that an undertaking expressed to be given 'on behalf of' may even be construed, in law, as the personal undertaking of the counsel giving it (*Re C* (1908) 53 Sol Jo 119; *Johnson v Ogilby* (1734) 3 P Wms 277; and *Appleton v BKS* (1804) 5 East 148). That kind of undertaking must be given by the counsel in his professional and not in his personal capacity (*Re Gee* 18452 Dow & L 997; *Re Fairthorne* (1846) 1 Saund & C 40; *United Mining and Finance Corp Ltd v Becher* (supra); *Silver and Drake v Baines* [1971] 1 QB 396, [1971] 1

All ER 473, CA; *R Pass* (1887) 35 WR 410; and *Re FC* (1888) WN 77). The literature on undertakings in litigation are voluminous. I may go on ad infinitum. At the end of the day, it is entirely up to me to decide on the issue of contempt and whether leniency should be meted out in big doses.

[13] By way of a rebuttal it was argued by Mr Mohd Hanif Idris that the third affidavit of the fifth defendant should have been filed and served on theplaintiffs' solicitors on 4 September 2003, but it was instead served on 5September 2003. The service was said to be delayed by a mere one day. And that the delay had caused no injustice to the plaintiffs. On the other hand, it was pointed out that if the third affidavit of the fifth defendant was expunged in its entirety as suggested by the learned counsel for the plaintiffs, it would cause grave injustice to the fifth defendant because this court would be deprived of knowing the true position regarding the plaintiffs' allegation that the fifth defendant had received the sum of RM2 million. That being the case, it was urged upon me to consider and take into account the third affidavit of the fifth defendant. That one day delay was explained in this way:

(i) that on 22 August 2003, the fifth defendant wrote a letter to Bumiputra Commerce Bank Bhd seeking confirmation whether account no 021360373682 belonged to her (see the letter annexed as exhibit SH–4A to the third affidavit of the fifth defendant in encl 59); and

(ii) that on 2 September 2003, Bumiputra Commerce Bank Bhd replied wherein it refused to divulge the information sought for by the fifth defendant for fear that it might infringe the provisions of the Banking and Financial Institutions Act 1989 (see the letter annexed as exhibit SH–5A to the third affidavit of the fifth defendant in encl 59).

[14] Time and again it was emphasised that the delay was negligible. It was for only one day. And that such delay would not prejudice nor cause an injustice to the plaintiffs at all. All these constituted the submissions of the learned counsel for the fifth defendant. It was further submitted that the letter dated 23 August 2003 from Bumiputra Commerce Bank addressed to the first defendant which was annexed as exhibit SH–3A to the third affidavit of the fifth defendant in encl 59 was the answer to the plaintiffs' allegation that the fifth defendant had received the amount of RM2 million. That letter marked as exhibit SH–3A to encl 59 was worded as follows:

PENGESAHAN PEMBAYARAN CEK NOMBOR 816104 DAN 816106 OLEH ASASI TRADE & MARKETING SDN BHD

Surat tuan bertarikh seperti di atas, dirujuk.

Setelah semakan dari rekod kami, pembayaran bagi cek-cek bernombor 816104 berjumlah RM5,000,000.00 dan 816106 berjumlah RM4,000,000.00 telah dibuat seperti jadual di bawah:

Tarikh	Jumlah (RM)	No Akaun	Nama
18/07/00	2,000,000.00	010131550764	Abdul Kareem A/L Mohamed
18/07/00	1,000,000.00	060130106140	Satimohan A/L Ayothiee
18/07/00	1,000,000.00	021992043439	Basheer Ahamed b Abdul
18/07/00	1,400,000.00	021360373683	Basheer Ahamed b Abdul
18/07/00	1,600,000.00	021992043439	Basheer Ahamed b Abdul
18/07/00	2,000,000.00	021360373683	Basheer Ahamed b Abdul

Tidak ada pembayaran yang melibatkan Pn Samsiah bte Hamdan.

Sekian,

Terima kasih.

[15] But that letter, as can be seen above, did not state as to whether account no 021360373682 belonged to the fifth defendant. Moreover, the fact that the fifth defendant's solicitor had breached his solemn undertaking to this court coupled with the prejudices as alluded to earlier would relegate the third affidavit of the fifth defendant in encl 59 into oblivion — it must be expunged in its entirety. This was my judgment and I so hold accordingly.

[16] With that, I must now proceed to the heart of the matter.

THE MAREVA INJUNCTION

[17] It goes without saying that this court has the jurisdiction to grant an interlocutory injunction restraining the disposal of property over which the particular plaintiff has a proprietary claim. A Mareva injunction too would restrain the particular defendant from disposing of, or even merely dealing with, the assets of the particular plaintiff which were assets over which the particular plaintiff asserts no proprietary claim but which after judgment those assets may be attached in order to satisfy a money judgment. More often than not, when the day of judgment arrives, the particular plaintiff may not be able to enjoy the fruits of that judgment fully or at all because of dissipation. To prevent this, a Mareva injunction is the answer to it. It is an injunction where the particular defendant may be prevented from dissipating such assets and in the words of Lord Donaldson MR in *Derby & Co Ltd v Weldon, (Nos 3 & 4)*

[1990] Ch 65 at 76, CA and Nicholls LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 3) (The Coral Rose)* [1991] 1 WLR 917 at 929 'a defendant is not permitted to thwart in advance orders which the court may make'. Indeed the width and breadth of a Mareva injunction is beyond imagination. A Mareva injunction may even be granted where the particular plaintiff does not even claim any interest in the assets and merely 'seeks an inhibition of dealings with them simply in order to keep them available for a possible future execution to satisfy an unconnected claim' (per Lord Mustill in *Mercedes-Benz AG v Leiduck* [1995] 3 All ER 929 at 939). So it is not uncommon for a Mareva injunction to be granted in a wide varying fact situation. Its grant is not confined to merely preventing the removal or disposal of assets so as to defeat a judgment but it also includes terms securing a particular property where the particular plaintiff asserts a proprietary or tracing claim. Indeed a Mareva injunction is all encompassing. It could be used to restrain the disposal of assets within the jurisdiction as well as without. For this proposition, reference should be made to the case of *Ninemia Maritime Corporation v Trave Schiffahrtgesellschaft mbH und Co KG (The Niedersachsen)* [1984] 1 All ER 398; [1983] 2 Lloyd's Rep 600, CA.

[18] Of pertinence would be this. That a Mareva injunction may be granted where it appears to the court that it is 'just and convenient to do so' and it may even be granted at any time. According to Jessel MR in *Day v Brownrigg* (1878) 10 Ch D 294 at 307 that the words 'just or convenient' in the statutory provision must be read as 'just, as well as convenient'. It is also ideal to refer to the case of *Beddow v Beddow* (1878) Ch D 89 at 93. Moreover those words do not mean that the court can grant an injunction simply because it thinks that it is convenient to do so but rather those words mean that the court should grant an injunction for the protection of rights or the prevention of injury according to the legal principles (*Aslatt v Southampton Corpn* (1880) 16 Ch D 143 at 148). Those words confer no arbitrary or unregulated discretion on the part of the court. Those words too do not authorise the court to invent new modes of enforcing judgments in substitution for the ordinary modes known to everyone at large (*Harris v Beauchamp Bros* (1894) 1 QB 801 at 808, CA; and *Morgan v Hart* (1914) 2 KB 183, CA). So, a Mareva injunction may even be granted after judgment with the sole aim of aiding execution as well as before judgment. The particular plaintiff should not be cheated from enjoying the proceeds of his action. A Mareva injunction is said to assist justice. Assets sufficient to satisfy the particular plaintiff's claim, should he succeed in obtaining judgment, may be 'frozen' by a Mareva injunction. I even venture to say that a 'worldwide' Mareva injunction may even be granted where the assets which are to be frozen are wholly located abroad or where some of the assets are within the jurisdiction and some are abroad.

[19] Based on the authorities which I have read, the court certainly has a wide discretion to restrain the particular defendant from removing assets,

whether money or goods, from the jurisdiction pending the trial of the action whenever it is just and convenient to do so (*Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093). This discretionary power originally exercised where a particular defendant was out of the jurisdiction has been extended and made available against a particular defendant even though he is based within jurisdiction (*Prince Abdul Rahman B Turki Al Sudairy v Abu-Taha* [1980] 3 All ER 409, [1980] 1 WLR 1268, CA which approved *Barclay-Johnson v Yuill* [1980] 3 All ER 190, [1980] 1 WLR 1259). It is now common knowledge and is regarded as settled that the power to grant a Mareva injunction may be exercised even if the particular defendant is a foreigner or is foreign based or whether or not he is domiciled, resident or present within jurisdiction (*AJ Bekhor & Co Ltd v Bilton* [1981] 2 All ER 565, [1981)] 2 WLR 601, CA). A Mareva injunction is an important remedy. It will be granted where there is a danger that the assets belonging to a particular defendant may be dissipated within the jurisdiction as well as removed out of jurisdiction (*Z Ltd v A* [1982] 1 All ER 556, [1982] 2 WLR 288, CA). It is ideal to note that in the case of *Chartered Bank v Daklouche* [1980] 1 All ER 205, [1980] 1 WLR 107, CA, a *Mareva* injunction was granted against a defendant who was paying only a fleeting visit to England. So, for those travellers who frequent England be warned of the long arm of the law.

[20] A Mareva injunction operates *in rem*. It takes effect from the moment it is pronounced on every asset of a particular defendant in relation to which it is granted. Thus, anyone who has notice or knowledge of the Mareva injunction is obliged to do whatever he reasonably can do to preserve the assets covered by its terms. If that person assists in disposing off those assets or any part of them he is guilty of contempt of court by interfering with the course of justice (*Z Ltd v A* (supra)). Thus, the receipt by a bank of notice of a Mareva injunction may automatically revoke a customer's instructions regarding his account and make it unlawful for the bank thereafter to honour the customer's cheques (*Z Ltd v A* (supra)). It is recommended to read the case of *Z Ltd v A* (supra) because the court there provided the necessary guidelines and directions on the grant of Mareva injunctions and their effect on banks and other third parties.

[21] The jurisdiction to grant a Mareva injunction extends not only to a debt or liquidated demand, it even extends to commercial actions. Actions and claims for damages for breach of contract or even for tort are subject to Mareva injunctions. In *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, [1980] 1 WLR 1252 CA, an injunction was granted in an action for personal injuries or under the Fatal Accidents Act 1976 restraining the removal of an aircraft from the jurisdiction. It is pertinent to note that a Mareva injunction may also extend to a ship and, if the need arises, to several kinds of security taken cumulatively provided that the size of the claim justifies it (*The Rena K* [1979] QB 377, [1979] 1 All ER 397). There must be assets located within the jurisdiction

in order to confer jurisdiction on the court to grant a Mareva injunction. The court can certainly infer the presence of such assets from the existence of a bank account even if that account is overdrawn (*Third Chandris Shipping Corpn v Unimarine SA* [1979] QB 645, [1979] 2 All ER 972, CA). A Mareva injunction would be refused if there is no evidence that the particular defendant possesses any removal assets within the jurisdiction (*Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [1978] QB 644, [1977] 3 All ER 324 CA). An injunction too will be refused if the value of the assets is nominal and their ownership is in question (*Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* (supra)). A Mareva injunction will also be refused where there is no evidence that the particular defendant is likely to remove the removable assets or would attempt to avoid his liability if judgment is entered against him (*Montecchi v Shimco (UK) Ltd* [1979] 1 WLR 1180, CA).

[22] It is germane to mention that a Mareva injunction may be granted or continued in aid of execution (*Cheltenham & Gloucester plc v Krausz & Anor*, *The Venus Destiny* [1980] 1 All ER 718, [1980] 1 WLR 460). Now, the guidelines to be observed on an application for a Mareva injunction may be stated in the following terms:

(1) the particular plaintiff must make full and frank disclosure of all matters in his knowledge which are material for the judge to know;

(2) the particular plaintiff must give particulars of his claim against the particular defendant, stating where possible the ground of his claim and its amount, and stating fairly the relevant points against it;

(3) the particular plaintiff must give some grounds for believing that the particular defendant has assets within the jurisdiction;

(4) the particular plaintiff too must give some grounds for believing, beyond the mere fact that the particular defendant is abroad, that there is a risk of the assets being removed before the judgment or the arbitral award is satisfied; and

(5) the particular plaintiff must give an undertaking as to damages — however, where the applicant plaintiff is otherwise entitled to a Mareva injunction, he will not be refused merely on the ground that the cross-undertaking in damages is or may be of limited or no value (*Allen v Jambo Holdings Ltd* (supra)).

[23] Briefly, that would be the general principles governing a *Mareva* injunction.

[24] I will now examine the following sub-heads in the context of the facts of the present case.

A GOOD ARGUABLE CASE

[25] Now, in its capacity as the asset fund managers, the plaintiffs had placed a total sum of RM239,798,255.46 in a Ringgit Malaysia account (hereinafter referred to as 'the RM account') with the third defendant by the name of Multitude Global Asset Management Private Limited-BVI (IBC No 329542) (hereinafter referred to as 'Multitude') through the fourth defendant by the name of Asasi Trade & Marketing Sdn Bhd (Co No 226557) (hereinafter referred as to 'Asasi') as the agent for Multitude, to be traded by the first defendant in the person of Ahmad Hj Hassan (hereinafter referred to as 'Ahmad Hassan') in spot forex transactions in USD/Sterling currencies as part of the plaintiffs' high yield programme for its clients.

[26] In addition to the Ringgit funds in the RM account as alluded to above, further sums of SGD584,340 and USD777,000 in non-Ringgit funds were also invested in the programme through direct transfers in Singapore through Ahmad Hassan and Multitude. These funds were invested via four separate Agreements signed by the second plaintiff and Multitude between January to December 2000. These agreements are collectively known as the Investment Management Agreements (hereinafter referred to as 'IMA'). Vigorous accounting was done resulting in the following. After reconciling with the bank and the trading accounts declared as held in trust for the plaintiffs and their clients and upon commissioning and receiving an in depth investigation report by an independent consultant by the name of TPM Consultants (hereinafter referred to as 'the TPM Report'), out of the Ringgit funds capital sums of RM239,798,255.46 a sum of RM 114,890,564.43 was paid out as profits to the plaintiffs. What was left was the sum of RM124,907,691.03 and this was the sum claimable from the defendants.

[27] The trading records available to the plaintiffs showed minimal trading done by Ahmad Hassan. And that the total loss came up to USD16,193,867.83 — which was equivalent to RM51,502,408.86, as alluded to in the TPM Report at section 3 of p 8. A written demand dated 25 September 2002 was issued to Multitude. But it fell on deaf ears. Neither Multitude nor its directors, nor Ahmad Hassan, nor the second defendant in the person of Mohd Firdaus Ramlee (hereinafter referred to as 'Mohd Firdaus Ramlee') nor Asasi have satisfactorily explained this discrepancy on credible grounds. A meeting was held between Ahmad Hassan, Ghazali Atan (the managing director of the plaintiffs), Wan Zahari b Wan Embong ('WZ'), the first plaintiff's ('MAM') finance manager, and Jaganathan s/o Naganathan of TPM Consultants on 2October 2002 in MAM's premises in order to obtain an explanation from Ahmad Hassan. That meeting yielded the following sorry state of affairs:

(1) When confronted for an explanation to account for the discrepancy, Ahmad Hassan admitted he had 'abused' the funds given to Asasi and Multitude and repaid monies to his 'old clients' from the capital transferred to his control.

(2) Ahmad Hassan admitted the allegation that what he did amounted to a criminal breach of trust.

(3) Ahmad Hassan insisted that because of what he had done, the funds received had been exhausted and that there were no longer any substantial amounts left. It must be borne in mind that the entire meeting was recorded with the knowledge and consent of Ahmad Hassan.

(4) The minutes of that meeting was sent to Multitude with a notice of seven days to respond to the demands to repay the balance of the plaintiffs' capital invested with Multitude.

(5) In his written reply dated 17 October 2002, Ahmad Hassan reiterated the explanation given in the meeting to the effect that all the monies had been exhausted. The Malay words employed by Ahmad Hassan were *'pupus'* and *'hangus'* and these words conveyed negative effects.

(6) The conclusions arrived at and drawn by the TPM Report were verbally presented to Ahmad Hassan and he did not challenge that report. Instead he admitted that he had 'abused' the trust reposed on him.

(7) At this point of time, it must be emphasised that Ahmad Hassan, Asasi and the fifth defendant did not query about the manner in which the TPM Report had been prepared.

[28] It must be borne in mind that the fifth defendant is a joint account holder with her husband Ahmad Hassan held in MAM Financial account number 816300. The fifth defendant was, at all material times, the director and shareholder of Asasi. It must also be recalled that the fifth defendant was, at all material times, the joint signatory with Ahmad Hassan in Asasi's account held at the bank. Now, interestingly from the available evidence the sum of RM2 million had been paid from Asasi via cheque number 816104 dated 18July 2003 into the fifth defendant's account bearing number 021360373682 in Bumiputra Commerce Bank Bhd. So, flowing from all these, it can readily be surmised that there was, at the very least, a good arguable case against Ahmad Hassan, Asasi and the fifth defendant. It was, using the language of the Court of Appeal in *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 CLJ 754 CA, a case where there was a 'fair chance' for the plaintiffs to obtain judgments against Ahmad Hassan, Asasi and the fifth defendant. The plaintiffs certainly had 'a good arguable case' (per Lord Denning MR in *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* (supra)).

ASSETS OF THE DEFENDANTS

[29] Now, the assets of the defendants included those that were set out in encl 4 as well as those other assets as alluded to by Ahmad Hassan, Asasi and the fifth defendant in their affidavits. It is germane to mention that:

(i) Ahmad Hassan — the first defendant, has disclosed his assets in his affidavit affirmed on 19 March 2003;

(ii) Asasi — the fourth defendant, has disclosed its assets in the affidavit affirmed by Ahmad Hassan on 19 March 2003; and

(iii) Samsiah bte Hamdan — the fifth defendant, has disclosed her assets in her affidavit affirmed on 19 March 2003.

THE REAL RISK OF DISSIPATION OF ASSETS

[30] The discrepancies and the missing sums included those amounts that were rightly due to Lembaga Tabung Haji and Mimos Berhad who have each sued MAM — the first plaintiff. Based on the TPM Report, it can be inferred and it was the submission of the learned counsel that the defendants have caused the sums deposited by the plaintiffs to be utilised by other means which were not contracted pursuant to the terms of the IMA — the Investment Management Agreements.

[31] It was vigorously submitted by counsel that Ahmad Hassan was less than truthful in declaring the whereabouts of the plaintiffs' monies deposited with him. It was submitted that Ahmad Hassan lacked probity on his part. In *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83, CA, there were clear inconsistencies between the declaration of trust and the title to the land, and between the appellant's statement of defence and his affidavit in reply, and the Court of Appeal held that the conduct of the appellant was lacking in probity and honesty. The Court of Appeal also held that, in the circumstances, there was a real risk that the assets of the appellant would be dissipated should the respondent succeed at the trial proper. In *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 5 CLJ 307, the learned Judicial Commissioner after finding that the conduct of the defendants there clearly lacked probity vigorously applied *Ang Chee Huat v Engelbach Thomas Joseph* (supra) and held that 'there was a real risk of the defendants dissipating the assets'.

[32] In the context of the present case, Ahmad Hassan did the following acts:

(a) Firstly, he affirmed in a statutory declaration dated 12 January 2002 that the whole of the monies were in Account number 816300 at Man Financial (S) Pte Ltd

(b) Secondly, he affirmed another statutory declaration dated 5 March 2002 stating that the whole of the monies were in the five accounts as stated in the statutory declaration.

(c) Thirdly, that more accounts were revealed by way of letters of authorisation confirming that the plaintiffs were the beneficial owners of those accounts.

(d) Fourthly, in the course of the contempt proceedings against Ahmad Hassan in civil suit no S5–21–22 of 2002 (see *Lembaga Tabung Haji v Metrowangsa Asset Management Sdn Bhd & Anor* (supra)), he admitted under oath to the court to the effect that eight other banking accounts belonged to him.

(e) Fifthly, Ahmad Hassan also transferred USD9,000,000 from ABN Amro Bank, Singapore to First Union National Bank in the United States on 26 March 2002.

(f) Sixthly, Ahmad Hassan breached an existing Mareva injunction obtained against him by Lembaga Tabung Haji when he withdrew USD47,000 from his UOB Bank, Singapore on 25 September 2002.

(g) Seventhly, Ahmad Hassan also confessed that he has banking accounts in Zurich (Swiss account) and Jersey Island.

[33] In addition to all these, the TPM Report at Appendix 4a showed that Ahmad Hassan, Asasi and the fifth defendant had conspired to defraud the plaintiffs out of the investment sums that were rightly due to them. Thus, to sum up, it was rightly submitted that there was a real risk that the defendants together or on a separate basis have and would dissipate the assets. I wholeheartedly agreed with the submissions advanced by the learned counsel for the plaintiffs.

WORLDWIDE MAREVA

[34] I have said earlier that a worldwide Mareva injunction may be granted by this court. There was nothing to prevent this court from granting a worldwide Mareva in favour of the plaintiffs. The assets of the defendants especially that of Ahmad Hassan — the first defendant, are abroad. Kerr LJ writing a separate judgment for the Court of Appeal in *Babanaft International Co SA v Bassatne And Another* [1989] 2 WLR 232, 242 observed succinctly as follows:

> I therefore proceed on the basis that in appropriate cases, though these may well be rare, there is nothing to preclude our courts from granting Mareva type injunctions against defendants which extend to their assets outside the jurisdiction.

BALANCE OF CONVENIENCE

[35] All the circumstances of the case must be taken into account and it would be unwise to list down all the various matters which may need to be taken into consideration in deciding where the balance lies (*Fellowes & Son v Fisher* [1976] 1 QB 122 at 137, CA). It was submitted on behalf of the plaintiffs that based on the facts as alluded to earlier and based further on all the circumstances of the case, the balance of convenience was in favour of the plaintiffs and that the Mareva injunction sought by the plaintiffs should be granted against Ahmad Hassan, Asasi and the fifth defendant. The plaintiffs further submitted that:

(i) they would suffer insurmountable injustice because Ahmad Hassan, Asasi and the fifth defendant would be at liberty to dispose and dissipate the assets if this court refused to grant the Mareva injunction;

(ii) the Mareva injunction sought by the plaintiffs merely meant to aid the plaintiffs in their quest for justice; and

(iii) the Mareva injunction as prayed for would assist in enforcing the judgment which the plaintiffs expected to obtain against Ahmad Hassan, Asasi and the fifth defendant (*A v C (Note)* [1981] QB 956).

[36] Put differently, the Mareva injunction in the context of the present case serves as a remedy for the purpose of restraining a judgment debtor or a potential judgment debtor from committing the abuse of dissipating or hiding clandestinely assets that the judgment creditor might lawfully attach for the purpose of satisfying a judgment that is to be given or likely to be given in his favour. That would be the scenario for the plaintiffs as against the defendants especially Ahmad Hassan, Asasi and the fifth defendant. As the judgment creditors the plaintiffs were entitled, so to speak, to the Mareva injunction as against the judgment debtors like Ahmad Hassan, Asasi and the fifth defendant, so to speak. It was as simple as that.

THE RESPONSE BY THE DEFENDANTS

[37] Counsel for the defendants were trying their level best, in the context of encl 4, to say that the fifth defendant played no role at all. But there was admission through the submissions of the learned counsel that Ahmad Hassan and Asasi were involved in the abuse of the investment funds. It must be recalled that Ahmad Hassan had on his own accord admitted that he had abused the investment funds.

[38] In regard to the fifth defendant it was contended that 'nothing leads to the fifth defendant'. But I have earlier said that the fifth defendant in the person of Samsiah bte Hamdan wore many hats. I must agree with the submissions that the fifth defendant would have had full knowledge of all transactions concerning the abuse of the investment funds. As a shareholder, a director and signatory to the fourth defendant — Asasi, it was improbable, if not impossible, for the fifth defendant to submit that she had no knowledge of any of the transactions concerning the abuse of the investment funds. So if not restrained by a Mareva injunction there was a real risk that the fifth defendant may proceed to dissipate further sums to the absolute and complete detriment of the plaintiffs. Viscount Haldane LC writing a separate judgment in the case of *Lennard's Carrying Company, Limited v Asiatic Petroleum Company, Limited* (1915) AC 705, 713 aptly said:

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be

sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.

[39] Denning LJ writing for the Court of Appeal in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons, Ltd* [1956] 3 All ER 624, 630, in style said:

> A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in LORD HALDANE'S speech in L*ennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 at pp 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty. This is shown by *R v ICR Haulage Ltd* (1944) 1 All ER 691) to which we were referred this morning. The Court said (ibid, at p 695):
>
> > Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company … must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case.
>
> So here the intention of the landlord company can be derived from the intention of their officers and agents.

[40] Of course, all these passages as reproduced above relate to different fact situations but the law distilled from these two cases are still germane and are applicable to the present case. That would, with respect, precisely state the role of the fifth defendant. She was not an angel as counsel would want this court to believe.

[41] I have in the course of dissecting encl 4 considered all the major issues raised by the parties thereto. Minor or inconsequential issues were not discussed in this judgment as they were insignificant.

[42] For all these reasons, I allowed encl 4 forthwith.

[43] I must now proceed to examine encl 21 and I must do so now.

ENCLOSURE 21

[44] By this enclosure, Ahmad Hassan — the first defendant, sought for an order that the Mareva injunction granted by my immediate predecessor on 21February 2003 as seen in encl 9 be varied on certain terms. In its original Malay text, by way of encl 21, Ahmad Hassan sought for the following prayers:

(a) Defendan Pertama diberi kebenaran untuk mengubah Perintah Injunksi Mahkamah Yang mulia ini bertarikh 21 February 2003 untuk membenarkan Defendan Pertama mengeluarkan dan/atau membelanjakan wang sejumlah RM150,000 atau suatu jumlah yang berpatutan daripada akaun Public Bank Berhad yang bernombor 3064877303 dan akaun Bumiputra-Commerce Bank Bhd yang bernombor 1253–0003203–05–50 Defendan Pertama yang telah ditahan oleh perintah injunksi yang bertarikh 21 March 2003;

(b) Apa-apa perintah dan relif yang difikirkan wajar dan suai manafaat oleh Mahkamah Yang Mulia ini; dan

(c) Kos bagi permohonan ini ditanggung oleh defendan pertama.

[45] And I have these observations to make. Firstly, at prayer (a) to encl 21 at the last line there was reference to an injunction order dated 21 March 2003. This was certainly an error because the injunction order was in fact dated 21February 2003 and this can be corroborated by looking at the order itself which can be seen in encl 9. Secondly, at prayer (a) to encl 21 there was reference to an account number with Bumiputra-Commerce Bank Bhd bearing number 1253–0003203–0550. This was also a blatant error. The account number withBumiputra-Commerce Bank Berhad should be 1253–0003203–05–0 as corroborated by p 4 of encl 4. Thirdly, prayer (a) of encl 21 sought leave to vary the injunction of this court dated 21 February 2003 given by my immediate predecessor to allow the first defendant in the person of Ahmad Hassan to withdraw and/or to spend a sum of money amounting to RM150,000 or a reasonable sum thereof from two named banks. For what purpose Ahmad Hassan should be allowed to withdraw and/or to spend a sum of money to the tune of RM150,000 or a reasonable sum thereof from two named banks was not stated. Why should this court accede to the request of Ahmad Hassan?

[46] The only inkling that Ahmad Hassan required the sum of RM150,000 can be seen in the grounds supporting encl 21 and the Malay text carried these versions:

a) Melalui Perintah Injunksi yang bertarikh 21 February 2003, defendan pertama, hanya dibenarkan untuk perbelanjaan sebanyak RM1,000 sahaja sebulan untuk nasihat dan perwakilan guaman akan tetapi jumlah RM1,000 ini tidak mencukupi.

b) Kebenaran daripada Mahkamah Yang Mulia ini adalah perlu dan penting agar Defendan Pertama dapat membayar yuran guaman defendan pertama untuk nasihat dan perwakilan guaman.

c) Alasan-alasan terperinci permohonan ini adalah seperti mana yang terkandung di dalam Afidavit Ahmad b Hassan yang diikrarkan pada 1 April 2003 dan difailkan bersama-sama di sini.

[47] Ground (b) as reproduced above gave the reason for the proposed withdrawal. It was for payment of the legal fees. Whose legal fees was it for? This was not stated in the grounds supporting encl 21. But the affidavit in support affirmed by Ahmad Hassan — the first defendant, on 1 April 2003 which was also filed on the same day as seen in encl 22 stated that the sum of RM150,000 was meant for the legal fees incurred by the learned counsel in the person of Tuan Hj Zamani b Ibrahim from Messrs Zamani Ibrahim Tarmizan & Co Para 7 of encl 22 merits reproduction and in the Malay text it is worded as follows:

> Setelah Writ Saman dan Perintah Tersebut diserahkan kepada saya, saya telah berjumpa dengan Tuan Hj Zamani b Ibrahim dari Tetuan Zamani Ibrahim, Tarmizan & Co, pada 7 March 2003 untuk mendapatkan nasihat dan perwakilan guaman. Tuan Hj Zamani b Ibrahim telah menasihati saya bahawa kes ini melibatkan persoalan undang-undang dan fakta yang rumit serta melibatkan dokumen-dokumen yang banyak, kes ini memerlukan masa dan tenaga yang lebih daripada kes-kes biasa. Dengan itu Tuan Hj Zamani bersetuju untuk mewakili saya dengan bayaran guaman sebanyak RM150,000
>
> Sesalinan surat bertarikh 13 March 2003 daripada Tetuan Zamani Ibrahim, Tarmizan & Co, dilampirkan di sini dan ditandakan sebagai eksibit 'AH-2'.

[48] It would appear that the whole lump sum of RM150,000 as legal fees would go to Tuan Hj Zamani b Ibrahim from Messrs Zamani Ibrahim Tarmizan & Co. But at the date of hearing of encl 21, the facts changed. By that time Ahmad Hassan had affirmed another affidavit styled as the *'Affidavit Balasan Defendan Pertama'* on 14 August 2003 which was also filed on the same day and it can be seen in encl 54. With this new affidavit, the sum of RM150,000 will be shared almost equally as legal fees between Messrs Zamani Ibrahim Tarmizan & Co and Messrs Fozi Zain & Partners. The breakdown would be as follows (see paras 8 and 9 of encl 54):

(a) the sum of RM70,000 constituted the outstanding legal fees for the work which had been done by Messrs Zamani Ibrahim, Tarmizan & Co such as preparing, drafting and filing the Statement of Defence, the affidavits opposing the plaintiffs' application for the Mareva injunction, the affidavits declaring the assets as well as attending to the meetings and the discussions for Ahmad Hassan, Asasi and the fifth defendant; and

(b) the sum of RM50,000 was for the initial legal fees which had been agreed for Messrs Fozi Zain & Partners and a further sum of RM30,000 was meant to be for the legal fees to be incurred in the near future.

[49] In my judgment, it was clear as crystal that as phrased and framed, prayer (a) to encl 21 did not reflect the true intention of Ahmad Hassan. It was badly drafted and it did not convey what the affidavit in encl 54 had said. Encl 21 was filed on April fool's day which was on 1st April 2003 while encl 54 was filed on 14th August 2003. In my judgment, as presently worded encl 21 must

be dismissed forthwith with costs. But, lest I fell into an error, I must now proceed further.

[50] The law may be stated as follows. The court certainly has the power to allow part of the assets or money covered and controlled by a Mareva injunction to be released (*Iraqi Ministry of Defence v Arcepey Shipping Co SA And Another* [1981] QB 65, [1980] 1 All ER 480; and *A v C (No 2)* [1981] QB 961, [1981] 2 All ER 126). But the release of such assets must be for a proper purpose (*Pacific Centre Sdn Bhd v United Engineers Bhd* [1984] 2 MLJ 143, *Ace King Pte Ltd v Circus Americano Ltd & Ors* [1985] 2 MLJ 75; *Atlas Maritime Co SA v Avalon Maritime Ltd (The 'Coral Rose')* [1990] 2 Lloyd's Rep 258; and affirmed vide [1991] 4 All ER 769, [1991] 1 Lloyd's Law Reports 563, CA). The examples of what would constitute a proper purpose to enable the release of such assets are many but, for this exercise, I shall provide only three examples. Thus, paying the debts that were due and outstanding would be caught within the meaning of a proper purpose (*Pacific Centre Sdn Bhd v United Engineers Bhd* (supra); and *A v C (No 2)* (supra)). And to pay legal expenses would be another classic example. Yet another example would be to maintain the ever rising costs of maintaining the upkeep of the family members.

[51] Here, it was submitted that there was no other way for the defendants to pay their legal fees except from the monies which had been frozen by the Mareva injunction. Other judges have been magnanimous in varying the Mareva injunctions and ordering the release of the monies. Thus, in *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1990] 3 MLJ 481, Zakaria Yatim J (as he then was) at p 493 aptly said:

> From Lorrain's affidavit and from the third letter exhibited to Mr Anad Krishnan's affidavit I find that Lorrain has a pressing need to instruct his solicitors in respect of the fourth habeas corpus application which is due for hearing on 11 June 1990. I also find that he urgently needs funds for his legal expenses in respect of his case in the European Commission for Human Rights. In my opinion it is appropriate for Lorrain to ask this court to allow him to use his assets within jurisdiction to pay for the amount asked for. To deny him to use his assets for this purpose may amount to denying him of proceeding with the fourth habeas corpus application and with the European Commission for Human Rights. Both cases involve the question of Lorrain's liberty.

[52] In *Iraqi Ministry of Defence And Ors v Arcepey Shipping Co SA And Anor* (supra), Robert Goff J allowed the Mareva injunction to be varied. The headnotes at p 65 would be apt to reproduce:

> On the application to vary the Mareva injunction:
>
> Held, granting the application, that the purpose of the Mareva jurisdiction was not to improve the position of any claimants to the property of an insolvent debtor but rather to prevent the injustice of a foreign defendant in English proceedings causing assets to be removed from the jurisdiction in order to avoid the risk of

having to satisfy a judgment in pending proceedings in this country; that, therefore, as the plaintiffs had not yet proceeded to judgment but were merely claimants for an unliquidated sum, the defendants should not be prevented from using their assets to pay their debts as they fell due; that it was immaterial whether or not the loan was illegal as the interveners, in applying for a variation of the injunction so that the defendants' insurance brokers would be free to repay the loan; were not seeking to enforce the loan; and that, in the circumstances, to permit the variation of the terms of the injunction would not be inconsistent with the policy underlying the Mareva jurisdiction.

[53] In *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62, FC, Abdoolcader FCJ delivering the judgment of the Federal Court succinctly said at p 64 of the report:

> It might perhaps be convenient at this stage to concisely perpend the principles and policy underlying a Mareva order elucidated in a chain of related cases of which we need only refer to three. In *PCW (Underwriting Agencies) Ltd v Dixon & Anor* [1983] 2 All ER 158; CA [1983] 2 All ER 697 which sets out the policy underlying the Mareva jurisdiction, it was held that the sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, and that the remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. This decision of Lloyd J went on appeal to the Court of Appeal ([1983] 2 All ER 697) which however did not deliver a judgment but by consent allowed the appeal and varied the judge's order, but the principles enunciated by Lloyd J were unaffected by the consensual variation made in the light of the factual circumstances of that case. The English Court of Appeal has also held in *Campbell Mussells & Ors v Thompson & Anor*, The Times dated May 30, 1984 that a Mareva injunction was never intended to put a plaintiff in the position of a secured creditor and every case had to be dealt with on its own merits.

[54] In *Ace King Pte Ltd v Circus Americano Ltd & Ors* (supra), the headnotes at p 76 read like this:

> (4) Leave should be given to the third parties to intervene and as they have shown that they have to pay legitimate debts, the order for the Mareva injunction should be amended to allow the debts to be paid.

[55] In *Poly Electronic & Electrical (M) Sdn Bhd v Daewoo Corp (No 1)* [2003] 2 MLJ 310, I had occasion to say at p 319 of the report the following:

> Of course, it goes without saying that a Mareva injunction may be varied by the defendant particularly when the defendant has to use his assets to meet his ordinary living standard or his business expenses. But in order to do that the defendant must disclose all his assets within jurisdiction including those assets not within the court's jurisdiction (see *Bekhor & Co Ltd v Bilton* [1981] 2 All ER 565).

[56] Now, all these cases — referring to *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* (supra), *Iraqi Ministry of Defence And Ors v Arcepey Shipping Co SA And Anor* (supra), *S & F International Ltd v Trans-Con Engineering Sdn Bhd* (supra), *Ace King Pte Ltd v Circus Americano Ltd & Ors* (supra), and *Poly Electronic & Electrical (M) Sdn Bhd v Daewoo Corp (No: 1)* (supra) are factually different and they are poles apart from the present case. In those cases the defendants there intended to use their own assets in order to pay their solicitors so that their solicitors could conduct their defences effectively. In such a situation it would not be permissible for the courts to deny the defendants of their lawful rights to use their own assets. Here, the first defendant in the person of Ahmad Hassan had admitted that the funds did not belong to him. Ahmad Hassan too further admitted that he had misused and abused the funds belonging to the plaintiffs' clients. That being the case, I certainly cannot accede to encl 21. Those assets were not owned by Ahmad Hassan and he had no right to use those funds as suggested by him in his affidavit in encl 54 at paras 8 and 9 thereto.

[57] I would make a mockery of the law if I were to allow encl 21. I declined to be magnanimous like those other judges. I must be guided by the law and the facts and nothing else.

[58] There was another factor that weighed heavily against Ahmad Hassan. In *Lembaga Tabung Haji v Metrowangsa Asset Management Sdn Bhd & Anor* (supra), Ahmad Hassan was held to be in contempt of court when he had refused to declare his list of assets pursuant to another Mareva injunction order that was obtained by Lembaga Tabung Haji against Metrowangsa Asset Management Sdn Bhd and himself. However, as alluded to earlier Ahmad Hassan had tendered his apology in open court during the contempt proceedings and the court had accepted his apology. Flowing from all these, it was submitted that Ahmad Hassan had not regretted his actions. It was emphasised that Ahmad Hassan had withdrawn his money amounting to USD47,000 from a bank in Singapore even though the Lembaga Tabung Haji Mareva injunction had restrained him from doing so. The act of Ahmad Hassan in withdrawing USD47,000 via two different cheques from one account which was not declared according to the terms of the Lembaga Tabung Haji Mareva injunction showed that there was a possibility that Ahmad Hassan had other alternative financial sources.

[59] It was apparent that the plaintiffs contested encl 21. It was highlighted that Ahmad Hassan had admitted that he had misused the funds placed with him by the plaintiffs. This was reiterated time and again. It was submitted that unless proven otherwise all the monies and all the assets currently under the control of Ahmad Hassan did not belong to him. It was further submitted that all the monies, funds and assets governed by the interim Mareva injunction should not be released at all. A submission was advanced to the effect that the total value of the assets purportedly belonging to Ahmad

Hassan was not sufficient to cover the amount claimed by the plaintiffs. That being the case it was submitted that in the event this court allowed encl 21, it would inevitably cause a severe deterioration of assets which did not even belong to Ahmad Hassan in the first place. It would be ideal, at this juncture, to refer to the case of *Atlas Maritime Co SA v Avalon Maritime Ltd (No 3)(The 'Coral Rose')* [1991] 1 Lloyd's Law Reports 563, a decision of the Court of Appeal. Writing a separate judgment Neill LJ had this to say at p 568 of the report:

> But it remains important to ensure that the right balance is preserved between the rights of the parties. The injunction must not be used so as to amount to an instrument of oppression which would bring about the cessation of ordinary trading. On the other hand, the Court must have regard to the interests of the plaintiff and consider whether the variation of the injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied. The Court must look at all the circumstances of the case in order to try to do justice between the parties.

[60] So it was incumbent on the part of the court to have regard to the interests of the plaintiffs and consider whether the variation of the injunction would involve a real risk that a judgment or award in the plaintiffs' favour would remain unsatisfied. In the circumstances, if encl 21 was allowed it would deteriorate the entire assets of Ahmad Hassan and it would undoubtdly cause severe injustice and prejudice to the plaintiffs.

AHMAD HASSAN HAD A FEW SOLICITORS ACTING FOR HIM

[61] It was evident that Ahmad Hassan had changed his solicitors on a number of occasions. That would entirely be the prerogative of Ahmad Hassan. But the frequency of changing solicitors should be questioned.

[62] It must be borne in mind that on each occasion when Ahmad Hassan changed his solicitors, the matter had to be adjourned on a number of occasions due to the purported reason that the cause papers were being transferred from the former solicitors to the new solicitors. This has prejudiced the plaintiffs since the whole proceedings had to be adjourned whilst awaiting for the transfer of the cause papers.

[63] It was submitted that when the suit was first instituted, Ahmad Hassan together with Asasi and the fifth defendant were represented by Messrs BC Teh & Yeoh. But before the hearing of the *inter partes* Mareva injunction, Messrs BC Teh & Yeoh had informed the plaintiffs' solicitors that they had ceased to represent Ahmad Hassan, Asasi and the fifth defendant. This information was extended to the plaintiffs' solicitors in a letter dated 8 March 2003. When the matter came up for hearing on the morning of 10 March 2003, Messrs Zamani Ibrahim, Tarmizan & Co had served a copy of the notice of appointment of solicitors which bore the same date namely, 10 March 2003.

[64] That morning, Tuan Hj Zamani Ibrahim, the partner of Messrs Zamani Ibrahim, Tarmizan & Co and counsel for Ahmad Hassan, Asasi and the fifth

defendant sought for an adjournment to enable him, in his personal capacity, to purchase Ahmad Hassan's house at number 1, Jalan Bukit Setiawangsa 8, Taman Setiawangsa, 54200 Kuala Lumpur held under Grant No 18257, Lot No 22002, Mukim Setapak, Daerah Wilayah Persekutuan.

[65] Another legal firm was appointed by Ahmad Hassan to act for him as well as to act for Asasi and the fifth defendant. That legal firm was non other than the law firm of Messrs Fozi, Zain & Partners. Thus, flowing from all these, it would be evident that Ahmad Hassan's application to withdraw RM150,000 from his account for an unknown reason as presently worded in encl 21 would surely meet with a dismal failure. Even if the reason for the withdrawal of RM150,000 as alluded to in paras 8 and 9 of the affidavit in encl54 would be accepted by this court — and that would be for the professional fees of Messrs Zamani Ibrahim, Tarmizan & Co as well as for Messrs Fozi Zain & Partners, yet encl 21 should not be entertained by this court at all. Ahmad Hassan as the applicant in encl 21 has a chequered history. It must be recalled that he admitted that the funds did not belong to him. It must also be recalled that he too admitted that he had misused and abused the funds belonging to the plaintiffs' clients. These were damning pieces of evidence that this court took into account. In all honesty, how could this court allow Ahmad Hassan's application in encl 21? There was no redeeming feature inherent and apparent in Ahmad Hassan, from the available evidence.

[66] On 20 June 2003 by way of encl 31, Ahmad Hassan succeeded in applying to this court to vary the Mareva injunction dated 21 February 2003 in order to allow his own counsel by the name of Tuan Hj Zamani b Ibrahim to purchase house number 1, Jalan Bukit Setiawangsa 8, Taman Setiawangsa, 54200 Kuala Lumpur. Encl 31 was allowed on two conditions as reflected in the order that has been extracted as per encl 43. Firstly, that the parties agreed that out of the proceeds of sale of that house amounting to RM550,000, a sum of RM281,208.02 as at 30 June 2003 be paid to Bumiputra-Commerce Bank Berhad, at Ampang Point in order to settle the overdraft facility and the term loan of Ahmad Hassan. Secondly, the parties agreed that the balance of the proceeds of sale of that house after payment to Bumiputra-Commerce Bank Berhad, at Ampang Point be deposited in an Islamic Joint Account in the names of Messrs Zul Rafique & Partners and Messrs Cheang & Ariff as stakeholders pending the disposal of the suit in court in its entirety. But Ahmad Hassan's present application in encl 21 as presently worded cannot be entertained by this court at all. Accordingly, for the reasons as adumbrated above, I dismissed encl 21 with costs.

Plaintiff's application granted. First defendant's application dismissed.

Reported by Loo Lai Mee